

CALIFORNIA COASTAL COMMISSION

NORTH CENTRAL COAST DISTRICT
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W-11a

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Staff: SLB – SF
Staff Report: November 20, 2003
Hearing Date: December 10, 2003

**STAFF REPORT – APPEAL
SUBSTANTIAL ISSUE**

APPEAL NO.: A-2-MAR-03-008

APPLICANTS: Warren Webber

LOCAL GOVERNMENT: Marin County

ACTION: Approved with Conditions

PROJECT LOCATION: 95 Olema-Bolinas Road & 850 Lauff Ranch Road
APNs 195-290-13, 188-170-45, & 193-010-19

PROJECT DESCRIPTION: Removal and disposal of approximately 153 cubic yards of fill, after-the-fact authorization for construction of a 6.5-foot-high deer fence, and the restoration and maintenance of two pre-existing drainage ditches adjacent to Bolinas Lagoon.

APPELLANTS: Tomales Bay Association

RECOMMENDATION: No Substantial Issue

1.0 EXECUTIVE SUMMARY**1.1 Summary of Staff Recommendation: No substantial Issue**

The staff recommends that the Commission, after public hearing, determine that no substantial issue exists with respect to the grounds on which the appeal has been filed. The approved development includes removal of an estimated 153 cubic yards of fill consisting of side cast material and rock debris from an approximately 8.99 acre parcel, spreading of removed fill over APNs 188-170-45 and 193-010-19, after-the-fact authorization for construction of a deer fence, and the restoration and maintenance of two pre-existing interior drainage ditches adjacent to Bolinas Lagoon.

The Commission received an appeal of the County's approval of the proposed development contending that: (1) the approved development is inconsistent with the wetland resource protection policies of the LCP; (2) the approved deer fence impacts wetland resources, visual resources, and wildlife movement; (3) the methodology used to determine the amount of fill to be removed was inadequate; (4) the change in type of agricultural use is inconsistent with the LCP; (5) the change in type of agricultural use is subject to a master-plan, development plan, and/or design review process according to the zoning; (6) the County approval does not include tidelands and wetlands findings necessary for resolving violations related to the settlement agreement between the applicant and the U.S. Army Corps of Engineers; and (7) the County in its approval of the development did not resolve outstanding violations.

Staff recommends that the Commission find that the appeal of the development approved by Marin County does not raise a substantial issue regarding the conformity of the approved development to the LCP wetland resource protection policies and impacts to visual and sensitive habitat resources. Furthermore, staff recommends that the Commission find that the appellant's contentions regarding development not approved by the County, the lack of tidelands and wetlands findings in the County's resolution approving the coastal development permit, and the County action's failure to carry out the terms of the settlement agreement between the U.S. Army Corps of Engineers and the applicant are invalid grounds for appeal of the coastal development permit.

2.0 STAFF RECOMMENDATION

No Substantial Issue

The staff recommends that the Commission determine that no substantial issue exists with respect to the grounds on which the appeal has been filed.

Motion

I move that the Commission determine that Appeal No. A-2-MAR-03-008 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.

Staff Recommendation of No Substantial Issue

Staff recommends a **YES** vote. Passage of this motion will result in a finding of No Substantial Issue and adoption of the following resolution and findings. If the Commission finds No Substantial Issue, the Commission will not hear the application de novo and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

Resolution to Find No Substantial Issue

The Commission finds that Appeal No. A-2-MAR-03-008 does not present a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency of the approved project with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

3.0 PROJECT SETTING AND DESCRIPTION

3.1 Project Location and Site Description

The approved development is located on an 8.99-acre parcel located at 95 Olema Bolinas Road, Bolinas, Marin County. The property is zoned C-ARP-10 (Coastal, Agricultural, Residential Planned District, one unit per 10 acres maximum density). The site is located on the west shore of Bolinas Lagoon approximately one mile north of the town of Bolinas and approximately 0.2 miles south of State Highway 1 (Exhibit 1, Location Map and Exhibit 2, Vicinity Map).

Bordering the parcel on the east are tidal and transitional wetlands of Bolinas Lagoon, as well as a 2.36-acre parcel (APN 195-290-24, Parcel 24) also owned by the applicant (Exhibit 3, Assessors Parcel Map). A vacant parcel owned by the Marin County Open Space District abuts the site on the south. The project site is also bounded by Pine Gulch Creek to the north and Olema-Bolinas Road to the east. The project site and the adjacent parcel (Parcel 24) create an "L" shaped piece of property totaling approximately 11 acres, which together constitute a portion of an approximately 100-acre organic farming operation known as Star Route Farms.¹

Located on the northeastern and southern sides of the project site are drainage ditches, levees, a deer fence, and a historic cattle fence (Exhibit 5, Site Plan). The levee on the southern boundary measures approximately 150 feet in length, four feet in height, and two feet in width and continues for another 225 feet onto Parcel 24 for a total length of approximately 375 feet. The eastern levee of approximately the same height and width of the southern levee measures 225 feet in length. It continues onto the southern boundary of Parcel 24 for approximately 562 feet. A drainage ditch runs parallel to each of the levees. The drainage ditches are approximately three feet deep and vary in width from approximately two to eight feet, and, like the levees, continue onto Parcel 24 as well. A 6.5-foot-high wire grid fence with wooden posts four to six inches in diameter set every 60 feet, and metal deer fence stakes infilling the posts at 20-foot intervals, rests atop the levees demarcating the approximate southern and northeastern boundaries of the project site. Immediately adjacent to the levees and the deer fence is a three-foot-high historic cattle fence. The elevation increases slightly from Olema-Bolinas Road (east to west) over the entire 11 acres (project site and Parcel 24) with the adjacent parcel receiving the most tidal influence.

The applicant organically farms the southwestern portion of the project site, with row crops in the summer and a cover crop in the fall. Typically, the cover crop is turned under in the spring unless it is too tall, in which case it is cut, composted, and reapplied. Salad greens, squash, or potatoes are sown and watered as needed. After the last harvest, a cover crop (clover, vetch, or other species) is sown in the fall whereupon it germinates with the first few rainfall events. The northern section of the project site is left fallow and includes a corner of riparian vegetation associated with Pine Gulch Creek. Portions of the remaining acreage, including the project site, are periodically mowed and composted and cows are sometimes brought in to graze the cover crop in the spring.

¹The applicant also proposes development that requires a CDP on Parcel 24 ; however, Parcel 24 is located in the Coastal Commission's original coastal development permitting jurisdiction. A coastal development permit application proposing development on Parcel 24 is also before the Commission as Item 12a.

3.2 Project Description

The approved development consists of removal an estimated 153 cubic yards of fill from the southern and eastern levees (Exhibit 6, Site Plan of Restoration Area). The fill consists of side cast material and rock debris from ditches adjacent to the levees. Once removed, the fill would be spread over approximately 20 acres of farmland property also owned by the applicant (APNs 188-170-45 and 193-010-19) located north and west of the project site on the west side of Olema Bolinas Road. The approved development also includes the removal of side cast soil material and rock debris along the north drainage ditch to be off-hauled to the upland farm property and the restoration and maintenance of two pre-existing interior ditches that convey water from across the Olema-Bolinas Road through the project site to the ditch along the eastern boundary of the property. In addition to the above development, the approved development includes after-the-fact authorization for a 6.5-foot high deer fence.

4.0 APPEAL PROCESS

4.1 Local Government Action

On September 12, 2002, the Marin County Deputy Zoning Administrator conditionally approved a coastal development permit authorizing the approved development.

On September 19, 2002, the Tomales Bay Association filed an appeal of this approval with the Marin County Planning Commission.

On November 18, 2002, the Marin County Planning Commission denied the appeal and conditionally approved the proposed project.

On November 25, 2003, the Tomales Bay Association appealed the Planning Commission approval to the Marin County Board of Supervisors.

On January 28, 2003, the Board of Supervisors denied the appeal, and upheld the decision of the Planning Commission, and approved the coastal development permit.

4.2 Filing of Appeal

On February 13, 2003, the Commission received notice of the County's final action approving a coastal development permit for the project. The Commission's appeal period commenced the following working day and ran for ten working days thereafter (February 14 through February 28, 2003). On February 28, 2003, within the 10-working day appeal period, the Commission received an appeal from the Tomales Bay Association (TBA) (Exhibit 4, Appeal by Tomales Bay Association). Following receipt of the appeal, the Commission mailed a notification of appeal to the County and the applicant.

Pursuant to Section 30621 of the Coastal Act, an appeal hearing must be set within 49 days from the date an appeal of a locally issued coastal development permit is filed. The appeal on the above-described decision was filed on February 28, 2003. The 49th day was April 18, 2003. The only Commission meetings within the 49-day period were, March 4-7, 2003 and April 8-11, 2003.

In accordance with the California Code of Regulations, on February 14, 2003, staff requested all relevant documents and materials regarding the subject approval from the County to enable staff to analyze the appeal and prepare a recommendation as to whether a substantial issue exists. The regulations provide that a local government has five working days from receipt of such a request

from the Commission to provide the relevant documents and materials. The Commission received the local record from the County on April 3, 2003. Consequently, the County permit file information had not been received as of March 28, 2003, the day of the mailing of staff reports to the Commission and interested parties on items on the Commission's April 2003 meeting agenda. Therefore, the requested information was not received in time for the staff to review the information for completeness or prepare a recommendation on the substantial issue question. Consistent with Section 13112 of the California Code of Regulations, since the Commission did not receive the requested documents and materials, Commission staff was prepared to recommend that the Commission open and continue the hearing. On March 18, 2003, the applicant waived his right to a hearing within 49 days of the date the appeal was filed, obviating the need to open and continue a hearing on the April agenda.

4.3 Appeals Under the Coastal Act

After certification of local coastal programs, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits (Coastal Act Section 30603).

Coastal Act Section 30603 provides, in applicable part, that an action taken by a local government on a coastal development permit application may be appealed to the Coastal Commission for certain kinds of developments, including the approval of developments located within certain geographic appeal areas, such as those located between the sea and the first public road paralleling the sea, or within 300 feet of the mean high tide line or inland extent of any beach or top of the seaward face of a coastal bluff; or in a sensitive coastal resource area; or located within 100 feet of any wetland, estuary, or stream. Developments approved by counties may be appealed if they are not designated as the "principal permitted use" under the certified LCP. Developments that constitute a major public works or a major energy facility may also be appealed, whether they are approved or denied by the local government.

The approved development is located between the sea and the first public road paralleling the sea, and thus within the Commission's appeal jurisdiction as defined in Section 30603 (a)(1) of the Coastal Act. Pursuant to Section 30603 (b)(1) of the Coastal Act, an appeal for development in this location is limited to the allegation that the development does not conform to the standards set forth in the certified LCP or the public access policies is set forth in the Coastal Act.

Section 30625 (b)(2) of the Coastal Act requires a de novo hearing of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal has been filed. In this case, because staff is recommending no substantial issue, the Commission will hear arguments and vote on the substantial issue. Proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. The only persons eligible to testify before the Commission on the substantial issue question are the applicant, persons who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding the substantial issue question must be submitted to the Commission or the Executive Director in writing.

It takes a majority of the Commissioners present to find that no substantial issue is raised. Unless it is determined that the project raises no substantial issue, the Commission will conduct a full de novo public hearing on the merits of the project at the same or subsequent hearing. If the

Commission conducts a de novo hearing on the appeal, the applicable test under Coastal Act Section 30604 would be whether the development is in conformance with the certified Local Coastal Program and the public access and recreation policies of the Coastal Act.

4.4 Standard of Review

Public Resources Code Section 30625(b) states that the Commission shall hear an appeal unless it determines:

With respect to appeals to the Commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

The term *substantial issue* is not defined in the Coastal Act or its implementing regulations. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." (Commission Regulations, Section 13115(b)). In previous decisions on appeals, the Commission has been guided by the following factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretation of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

If the Commission chooses not to hear an appeal, appellant nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to California Code of Civil Procedure, Section 1094.5.

5.0 SUBSTANTIAL ISSUE ANALYSIS

5.1 Appellants' Contentions

The Coastal Commission received one appeal of the County's action on the approved development. The full text of the appeal is included in Exhibit 4. The appeal filed by the Tomales Bay Association includes the following contentions (Exhibit 4):

- The methodology used to determine the amount fill approved for removal was inadequate.
- The resolution for the coastal development permit authorizing the approved development lacks wetland resources protection findings.
- The authorization of the construction of the 6.5-foot fence deer fence is inconsistent with wetland resource protection policies of the LCP.

- The approved deer fence impacts visual resources, restricts movement of and is a danger to wildlife, and is not set back a sufficient distance to minimize impacts to sensitive habitat.
- The creation of ditches, removal of vegetation, construction of a platform, installation of culverts, a drainage sump, and an irrigation system, and land planning and plowing, have significantly altered on-site wetlands inconsistent with wetland and habitat resource protection provisions of the LCP.
- The change from infrequent grazing to intense row cropping is inconsistent with LUP Natural Resource Policy 17 and Zoning Code Section 22.56.130(G-6) and that the County did not evaluate the conflict raised by the change under those policies.
- The change in use is subject to a master plan, development plan and/or design review process according to C-ARP (Coastal, Agricultural, Planned) and Zoning District (Zoning Code Section 22.57.024).
- The County in its approval of the development did not include tidelands findings and wetland resource protection findings necessary for resolving violations related to the settlement agreement between the applicant and the U.S. Army Corps of Engineers. The appellant also contends that the tidelands findings contained in the approval resolution fail to recognize the property as a wetland.
- The County in its approval of the development did not resolve outstanding violations.

In this case, for reasons further specified below, the Commission exercises its discretion and determines that the appeal of the development approved by the County does not raise a substantial issue of conformity of the approved development with the certified LCP.

5.2 Appellant's Contentions that Raise No Substantial Issue

5.2.1 Wetland Resources

Contention

The appellant contends that the after-the-fact authorization of the 6.5-foot fence deer fence is inconsistent with LUP Natural Resource Policies 13(b) and 18 and Zoning Code Sections 22.56.130(G-5) and 22.56.130(4).

Applicable Policies

LCP Natural Resources Policy 13 (b) states:

The diking , filling , dredging, and other alterations of these wetlands shall occur only for minor public works projects and shall be in conformance with the Coastal Act Section 30233. The construction of physical improvements along Bolinas Lagoon parklands is not consistent with these Lagoon policies.

Section 22.56.130 (G)(5) states in relevant part:

The diking, filling, dredging and other alterations of wetlands shall occur only for minor, public works projects and shall be in conformance with the Coastal Act Section 30233. No physical improvements along the county parklands surrounding Bolinas Lagoon shall occur. Land uses in and adjacent to wetlands shall be evaluated as follows:

- a. The filling of wetlands for the purposes of single-family residential development shall not be permitted.*
- b. Allowable resource-dependent activities in wetlands shall include fishing, recreational clamming, hiking, hunting, nature study, birdwatching and boating.*
- c. No grazing or other agricultural uses shall be permitted in wetlands except in those reclaimed areas presently used for such activities.*
- d. A buffer strip one hundred feet in width, minimum, as measured landward from the edge of the wetland, shall be established along the periphery of all wetlands. Development activities and uses in the wetland buffer shall be limited to those allowed pursuant to Section 30233 of the Coastal Act of 1976.*
- ...
f. All conditions and standards of the LCP, relating to diking, filling and dredging shall be met.
[Emphasis added.]*

LCP Natural Resource Policy 18 states:

To the maximum extent feasible, a buffer strip, a minimum of 100 ft. in width shall be maintained in natural condition along the periphery of all wetlands as delineated by the Department of Fish and Game and in accordance with Section 30121 of the Coastal Act and with the criteria developed by the US Fish and Wildlife Service. No uses other than those dependent upon the resources shall be allowed within the buffer strip.

Section 22.56.130 (G) (4) states:

Development applications on lands surrounding Bolinas Lagoon and other wetlands as identified on the appeals area map(s) shall include the designation of a wetland buffer area. The buffer area shall include those identified or apparent wetland related resources but in no case shall be less than a minimum of one hundred feet in width from the subject wetland. To the maximum extent feasible, the buffer area shall be retained in a natural condition and development located outside the buffer area. Only those uses dependent upon the resources of the wetland shall be permitted within the wetland buffer area.

Discussion

The approved development is located adjacent to Parcel 24, which consists entirely of wetlands, and Bolinas Lagoon. The report prepared by Prunuske Chatham, Inc. for the County of Marin and contained in the administrative record concluded that the vegetative makeup of the project site and Parcel 24 prior to the applicant's purchase of the property included approximately one acre of salt marsh in the southeast quadrant of the property (Parcel 24) that graded to seasonal freshwater wetland and gradually sloped to upland near the road. Although Prunuske Chatham, Inc. did not determine an exact wetland upland boundary, the historic record indicates that perhaps as much as 50% or more of the area currently under cultivation on the project site was

seasonal wetland. The report further states that both the project site and the adjacent parcel are predominantly wetland (Prunuske Chatham, Inc. 2002).

The Marin County Unit I LCP contains policies and standards that are intended to protect Marin County's wetland resources. Both Natural Resources Policy 13 (b) and Zoning Code Section 22.56.130 (G)(5) strictly limit the types of development allowed within a wetland, and Natural Resources Policy 18 and Zoning Code Section 22.56.130 (G)(4) require a minimum of a 100-foot buffer area be maintained along the periphery of all wetlands. As approved, the coastal development permit includes after-the-fact authorization for a 6.5-foot high deer fence in what likely constitutes wetlands or is within 100 feet of wetlands. As noted above, the appellant asserts that the fence is not allowable development under the wetland resource protections of the certified LCP.

In determining whether the appellant's contention raises a substantial issue, the Commission considers, in part: (1) the degree of factual and legal support for the local government's decision; (2) the extent and scope of the approved development; and (3) the precedential value of the local government's decision for future interpretation of its LCP.

The County approved approximately 700 linear feet of a 6.5-foot high deer fencing on APN 195-290-13 (Exhibit 7, Photographs of Deer Fence). Four square feet of fill results from the posts supporting the approved fence. The approved fence is located immediately adjacent to an existing historic cattle fence. The cattle fence, while only 3 feet tall, results in approximately 60 square feet of fill (15 times the amount of fill that caused by from the approved fence). Given the insignificant amount of fill associated with the approved fence, the extent and scope of the development as approved by the County is minor.

Moreover, the approved development allows for continuing agricultural use of the property, which is clearly contemplated by the LCP. Section 22.56.130 (G)(5)(C) states that agricultural uses in wetlands are limited to those in reclaimed areas, presently used for such activities. The approved development is located on agriculturally zoned land and agricultural activities have occurred on the property since the early 1900s, long before the passage of the Coastal Act and certification of the Marin County Unit I LCP. Grazing was the primary historic use of the site, which was supported by the historic cattle fence that still exists on the property. In the early 1980s the applicant changed the type of agricultural use from grazing to row cropping. With the change in agricultural use came different managerial challenges, including foraging deer. Deer are capable of jumping over the three-foot high cattle fence and will graze the row crops. As such, the cattle fence was not effective in keeping out the deer and thus, no longer sufficient to support the ongoing agricultural use of the property. At first the applicant managed the deer under a predator permit from the Department of Fish and Game (DFG); however, DFG stopped issuing predator permits in the early 1990s if applicants did not try nonlethal control methods first, which required the applicant to approach managing the deer differently. Thus, the applicant installed a deer fence, for which the County gave after-the-fact authorization. As discussed, such circumstances under which the County authorized the fence are very specific. Since the property was in agricultural production prior to the passage of the Coastal Act and certification of the Marin County Unit I LCP, the LCP contemplates continued agricultural production on the parcel, and the fence is needed to support the continued agricultural use of the property the County's action approving the fence can be considered consistent with Section 22.56.130 (G)(5)(C) and will not set an adverse precedent for future interpretation of the LCP.

Because the approved development is minor in extent and scope and is in support of a continued agricultural use consistent with the land-use designation and zoning of the certified LCP, the Commission finds that the appellant's contention that the approved fence is inconsistent with the wetland protection policies raises no substantial issue of conformity with policies of the certified LCP.

5.2.2 Visual Resources

Contention

The appellant contends that the deer fence, impacts visual resources. The appellant further states:

About 1996 a 6-ft. game fence was erected on top of the dikes from Olema Bolinas Road east to the south/east corner and thence north to the northeast corner of the property and adjacent to Bolinas Lagoon. This game fence detracts from the enjoyment by the public of the previously highly scenic unobstructed view of Bolinas Lagoon and a picturesque and unmaintained low historic fence. The game fence is alongside and within a few feet of the trail on public parkland from Olema Bolinas Road traveling east to the Lagoon and degrades the view experience of the walkers and is incompatible with the area.

Based on the above information, the appellant contends that the approved development fails to protect public views to and along the coast from public roads and recreational areas.

Applicable Policies

LUP Visual Resources Policy 21 states in relevant part:

To the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, Bolinas Lagoon, or the national or State parklands from Highway 1 or Panoramic Highway.

Section 22.56.130 (O)(3) states:

The height, scale, and design of new structures shall be compatible with the character of the surrounding natural or built environment. Structures shall be designed to follow the natural contours of the landscape and sited so as not to obstruct significant views as seen from public viewing places.

Discussion

LUP Visual Resources Policy 21 requires that new development not impair or obstruct an existing view of Bolinas Lagoon. Zoning Code Section 22.57.130(O)(3) requires that the height, scale, and design of the structures be compatible with the character of the surrounding natural or built environment. It further requires that structures are designed to follow the natural contours of the landscape and sited so as not to obstruct significant views as seen from public viewing places. As approved, the development includes a 6.5 ft.-high wire mesh deer fence with two strands of top wire. Wooden posts four to six inches in diameter are set every 60 feet, and metal deer fence stakes infill the posts at 20-foot intervals. The appellant contends that the approved fence obstructs the views of Bolinas Lagoon from the adjacent open-space parkland and Olema Bolinas Road. While the fence is visible from both the road and the public trail, the wire mesh,

which measures approximately six inches by six inches, is essentially transparent and does not impair or obstruct views of the ocean, Bolinas Lagoon or parklands. Furthermore, the approved fence will sit three to four feet lower than it does presently once the unpermitted fill is removed so that it follows the natural contours of the landscape.

Thus, as approved, the deer fence is designed such that it would be compatible with the character of the surrounding natural and built environment, follow the natural contours of the landscape, and would not obstruct significant views of Bolinas Lagoon as seen from Olema Bolinas Road and the adjacent open-space parcel, consistent with the LUP Visual Resources Policy 21 and Zoning Code Section 22.57.024(1)(g)(B). Therefore, the Commission finds that the appeal raises no substantial issue regarding the conformity of the approved development project with LUP Visual Resources Policy 21 and Zoning Code Section 22.57.130(O)(3).

5.2.3 Fill Removal Estimation

Contention

The appellant contends that the methodology used to determine the amount of the fill approved for removal was inadequate. The appellant states:

Another troublesome area between the permits and the Settlement Agreement is the fact that in the survey intended to estimate the fill removal there is not one full cross-section showing all of the dikes to the wood fence and grade level as described in the Settlement Agreement. This leads to serious concerns about the estimates on volume to be removed. We support the removal of the dikes (side cast/fill), but without a more complete survey [MC 22.77.040 (1)], there is no assurance that all the side cast/fill material will be removed and the contours restored to the 1981 levels.

Applicable Policies

LCP Natural Resources Policy 13 (b) states:

The diking , filling , dredging, and other alterations of these wetlands shall occur only for minor public works projects and shall be in conformance with the Coastal Act Section 30233. The construction of physical improvements along Bolinas Lagoon parklands is not consistent with these Lagoon policies.

Section 22.56.130 (G)(5) states:

The diking, filling, dredging and other alterations of wetlands shall occur only for minor, public works projects and shall be in conformance with the Coastal Act Section 30233. No physical improvements along the county parklands surrounding Bolinas Lagoon shall occur. Land uses in and adjacent to wetlands shall be evaluated as follows:

- ...
- b. Allowable resource-dependent activities in wetlands shall include fishing, recreational clamming, hiking, hunting, nature study, birdwatching and boating.*

- c. *No grazing or other agricultural uses shall be permitted in wetlands except in those reclaimed areas presently used for such activities.*
- d. *A buffer strip one hundred feet in width, minimum, as measured landward from the edge of the wetland, shall be established along the periphery of all wetlands. Development activities and uses in the wetland buffer shall be limited to those allowed pursuant to Section 30233 of the Coastal Act of 1976.*

...

All conditions and standards of the LCP, relating to diking, filling and dredging shall be met.

Discussion

To determine the estimated amount of fill to be removed from the existing berms on the property, the applicant hired an engineering geologist who prepared a Soil Reconnaissance Investigation. The objective of the reconnaissance was to investigate the depth of contact between new and old fill material on the berms located along the southern and eastern boundaries of the project as shown on the partial site survey map, prepared by surveying engineers (Exhibit 8, Sediment Sample Cross-sections).

The County in its administrative record further detailed the manner in which the total amount of estimated fill was determined. The record shows that the extent of the volumetric estimates of soil to be removed was determined by: (1) continuously digging and logging 13 hand-auger soil borings located at approximately 100 foot intervals along the berms; (2) plotting the contact between the pre-existing grades and the applicant's fill material on cross-sections of the berms surveyed by the engineers; and (3) providing the completed cross-sections to the surveying engineers to facilitate the estimation of the volume of new fill to be removed from the berms. The borings ranged in depth from approximately two to three feet below ground level at each of the cross-section locations marked on the Partial Site Survey. The borings were continuously sampled using the hand auger and a six inches long Modified California Sampler using a slide hammer. A small test pit was hand excavated in one location to better observe the nature of the contact between the old and new fill material. The borings and soil samples were logged under the supervision of a California Registered Certified Engineering Geologist in accordance with industry practices and standards. The approximate depth of contact between the old and new fill materials for each of the cross-sections was shown on the cross-sections illustrated on the Partial Site Survey. Where the contact was not observed in the field, the depth of the contact was inferred from the observed contact depth at adjacent boring locations and is shown as a queried dotted line on the cross-sections. Using this information, the engineers estimated the volume of fill material to be removed from the berms as approximately 153 cubic yards.

As noted above, the factual support contained in the record demonstrates that the methodology employed by the applicant is adequate to estimate the amount of fill to be removed. Furthermore, the County's action in approving the CDP acknowledged the volumetric quantities provided by the applicant's consultants were estimates only. The County conditioned the permit such that the ultimate volumetric quantity of soil to be removed from the project site will be determined by the methodologies utilized by the supervising engineers of the Army Corps of Engineers during the physical activity of the soils removal. The conditions of approval also allow for a differential between the estimated in actual amounts of fill material to be removed.

Therefore, the Commission finds that the appellant's contention that the methodology used to determine the amount of fill approved for removal was inadequate does not raise a substantial issue of conformity with the policies of certified LCP.

5.2.4 Habitat

Contention

The appellant contends that the approved deer fence restricts movement of and is a danger to wildlife. The appellant further asserts that approved development is not set back a sufficient distance to minimize impacts on sensitive habitat.

Applicable Policies

LCP Habitat Protection Policy 23:

Development adjacent to wildlife nesting and roosting areas shall be set back a sufficient distance to minimize impacts on the habitat area. Such development activities shall be timed so that disturbance to nesting and breeding wildlife is minimized and shall, to the extent practical, use native vegetation for landscaping.

LCP Habitat Protection Policy 25 states:

Fences , roads, and structures which significantly inhibit wildlife movement, especially access to water, shall be avoided.

Discussion

LCP Habitat Protection Policy 25 requires that fences that significantly inhibit wildlife movement, particularly access to water, be avoided. LCP Habitat Protection Policy 23 requires that development adjacent to wildlife nesting and roosting areas be set back a sufficient distance to minimize impacts on the habitat area. As discussed, the approved development includes after-the-fact authorization of a 6.5-foot high wire mesh deer fence with two strands of top wire. Wooden posts four to six inches in diameter are set every 60 feet, and metal deer fence stakes infill the posts at 20-foot intervals. The fence continues onto the adjacent Parcel 24, which effectively separates the 11-acre property (the project site and Parcel 24) from Bolinas Lagoon.

In determining whether the appellant's contentions that the approved fence inhibits wildlife movement and that it does not minimize impacts on sensitive habitat raise a substantial issue, the Commission considers, in part the significance of the coastal resource affected by the decision.

The purpose of the approved fence is to keep deer from entering the project site and grazing the row crops. As such, the fence is designed to be tall enough to prevent deer from jumping the fence and the wire mesh openings are small enough that deer cannot pass through; however, the approved fence will not prohibit wildlife movement of birds and small mammals. In addition, not only will the approved fence allow birds and small mammals to access the project site, but also the nature of the wire mesh fence allows the tides of Bolinas lagoon to continue to move onto the parcel. Nevertheless, the approved fence will directly impact the deer by excluding potential foraging land from the available land in the region; however, the amount of excluded

land will only equal 11 acres. In addition, deer are currently not endangered or are listed as species of concern. Therefore, adverse impacts to deer that will result from the approved fence are insignificant.

Thus, as approved, the deer fence is designed such that it will not significantly inhibit wildlife and is set back a sufficient distance from wildlife nesting and roosting areas, consistent with LCP Habitat Protection Policies 23 and 25. Therefore, the Commission finds that the appeal raises no substantial issue regarding the conformity of the approved development project with LCP Habitat Protection Policies 23 and 25.

5.2.5 Wetlands Findings

Contention

The appellant contends that the County in its approval of the development did not include wetland resource protection findings necessary for the project to be in harmony and conformance with the LCP.

Discussion

The appellant's contention does not include allegations that the approved development is inconsistent with the policies of the certified LCP or the Coastal Act public access policies. In addition, although the County did not include wetland resource protection findings in its resolution approving the project; other than the fence discussed above, the approved development extends to removal of wetland fill. Therefore, the Commission finds that even if this contention is a valid grounds for appeal under Section 30603 of the Coastal Act despite its failure to allege that the approved development does not conform to the certified LCP or the Coastal Act public access policies, the contention does not raise a substantial issue of conformity of the approved development with the certified LCP or the access policies of the Coastal Act.

5.3 Appellants Contentions that are Not a Valid Ground for Appeal

Section 30603(b)(1) of the Coastal Act states:

The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.

As discussed below, some of the contentions raised in the appeal do not present potentially valid grounds for appeal in that they do not allege the project's inconsistency with policies and standards of the LCP.

5.3.1 Wetlands and Environmentally Sensitive Habitat Areas

Contention

The appellant contends that development other than that approved by the County in its action on CDP No. 01-03 such as the creation of ditches, removal of vegetation, construction of a platform, installation of culverts, a drainage sump and an irrigation system and land planing and plowing, have significantly altered wetlands on-site inconsistent with LUP Natural Resource Policy 13 (b) and Zoning Code Section 22.56.130 (G-5), which list allowable development in a wetland, LUP Natural Resource Policy 18 and Zoning Code Section 22.56.130 (4), which require a minimum 100-foot wetland buffer, LUP Habitat Policy 23, which requires habitat buffers, LUP Habitat

Policy 26 and Zoning Code Section 22.56.130, which protect upland grassland feeding areas, and Zoning Code Section 22.56.130 (I-1), which prohibits significant alteration or removal of significant vegetation on sites identified on the natural resource maps and described in the LCP.

Discussion

The appellant's contentions do not include allegations that the approved development is inconsistent with the policies of the certified LCP or the Coastal Act public access policies. Rather, the appellant's contentions allege that development not considered by the County in its action on CDP No. 01-03 is inconsistent with the policies of the certified LCP. The Commission's review authority under the appeal is limited to the approved development. The construction of ditches and platforms, installation of culverts, a drainage sump and irrigation pipes, as well as plowing and land planing activities, were not considered by the County in its action on CDP No. 01-03. Furthermore, the platform and culverts referenced in the appeal are located on the adjacent property, which is part of the Coastal Commission's original permitting jurisdiction. Therefore, the Commission finds that this contention is not a valid ground for appeal under Section 30603 of the Coastal Act because it does not contain an allegation that the development approved by the County in its action on CDP No. 01-03 fails to conform to the certified LCP or the Coastal Act public access policies.

5.3.2 Change in Use

Contention

The appellant contends that the change from infrequent grazing to intense row cropping is inconsistent with LUP Natural Resource Policy 17 and Zoning Code Section 22.56.130(G-6) and that the County did not evaluate the conflict raised by the change under those policies. In addition, the appellant's assert that the change in use is subject to a master plan, development plan and/or design review process according to C-ARP (Coastal, Agricultural, Planned) and Zoning District (Zoning Code Section 22.57.024).

Discussion

LUP Natural Resource Policy 17 states that in order to protect the wetlands and upland habitat values of the parcel, changes in existing grazing use of the site shall be preceded by detailed environmental investigation and shall assure protection of the habitat values of the site in accordance with other policies and the LCP. Zoning Code Section 22.56.130(G-6) also states that any change in the present density and type of use shall be preceded by a detailed environmental investigation and assessment of the resources of the site. It further state that no development or change in use which adversely impacts these resource values shall be permitted. The appellant maintains that a detailed environmental assessment as required by the LCP should have been completed before the applicant began cultivating crops on the property and that a master plan, development plan and/or design review should have been carried out according to Zoning Code Section 22.57.024.

The appellant's contentions do not include allegations that the approved development is inconsistent with the policies of the certified LCP or the Coastal Act public access policies. The Commission's review authority under the appeal is limited to the approved development. The change from infrequent grazing to row cropping was not considered by the County in its action on CDP No. 01-03. However, even if the contentions were valid under Section 30603 of the Coastal Act, the County has taken the position that a change from one type of agricultural use to another type of agricultural use is not considered development under the certified LCP.

Furthermore, the Commission has received correspondence from individuals involved in authoring language from which some of the original certified LCP was drafted (Exhibit 9, Heneman Letter). These individuals have stated that the intention of both the LUP policy and zoning code section was to prevent a change from the existing grazing use of the site to a use other than agriculture. Therefore, the Commission finds that these contentions are not valid grounds for appeal under Section 30603 of the Coastal Act because they do not contain allegations that the approved development does not conform to the certified LCP or the Coastal Act public access policies.

5.3.3 Tidelands Findings

Contention

The appellant contends that the County in its approval of the development did not include tidelands findings and wetland resource protection findings necessary for resolving violations related to the settlement agreement between the applicant and the U.S. Army Corps of Engineers. The appellant also contends that the tidelands findings contained in the approval resolution failed to recognize the property as a wetland.

Discussion

The appellant's contentions do not include allegations that the approved development is inconsistent with the policies of the certified LCP or the Coastal Act public access policies. The adequacy of the County's review of the approved development under the settlement agreement and the tidelands permit ordinance is not governed by the policies of the certified LCP or by the public access policies of the Coastal Act. Therefore, the Commission finds that these contentions are not valid grounds for appeal under Section 30603 of the Coastal Act because they do not contain allegations that the approved development does not conform to the certified LCP or the Coastal Act public access policies.

5.3.4 Violations

Contention

The appellant contends that the County in its approval of the development did not resolve outstanding violations.

Discussion

The appellant's contentions do not include allegations that the approved development is inconsistent with the policies of the certified LCP or the Coastal Act public access policies. Instead, the contention alleges that the County in its review of the approved permit failed to address alleged violations other than the unpermitted fill and deer fence. The Commission's review authority under the appeal is limited to the County's action on the approved development. Therefore, the Commission finds that this contention is not a valid ground for appeal under Section 30603 of the Coastal Act because it does not contain an allegation that the approved development does not conform to the certified LCP or the Coastal Act public access policies.

Exhibits:

1. Location Map
2. Vicinity Map
3. Assessors Parcel Map

4. Appeal by Tomales Bay Association
5. Site Plan
6. Site Plan of Restoration Area
7. Photographs of Deer Fence
8. Sediment Sample Cross-sections
9. Correspondence from Burr Heneman dated September 2, 2003